ORIGINAL

(12)

No. 06-6407

Supreme Court, U.S.
FILED
DEC - 6 2006
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

SCOTT LOUIS PANETTI,

Petitioner,

V.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

RESPONSE TO STATE'S BRIEF IN OPPOSITION

Keith S. Hampton*
1103 Nueces Street
Austin, Texas 78701
(TEL) 512-476-8484
(FAX) 512-476-0953

Michael C. Gross
106 S. St. Mary's Street
San Antonio, Texas 78205
(TEL) 210-354-1919
(FAX) 210-354-1920

Gregory W. Wiercioch
Texas Defender Service
430 Jersey Street
San Francisco, California 94114
(TEL) 415-285-2472
(FAX) 415-285-2472

* Counsel of Record, Member Supreme Court Bar

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CAPITAL CASE

QUESTION PRESENTED

DOES THE EIGHTH AMENDMENT PERMIT THE EXECUTION OF A DEATH ROW INMATE WHO HAS A FACTUAL AWARENESS OF THE REASON FOR HIS EXECUTION BUT WHO, BECAUSE OF SEVERE MENTAL ILLNESS, HAS A DELUSIONAL BELIEF AS TO WHY THE STATE IS EXECUTING HIM, AND THUS DOES NOT APPRECIATE THAT HIS EXECUTION IS INTENDED TO SEEK RETRIBUTION FOR HIS CAPITAL CRIME?

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RESPONSE TO STATE'S BRIEF IN OPPOSITION

Petitioner Scott Louis Panetti files this response to the State's Brief in Opposition.

I. THE STATE COURT DECISION IS NOT ENTITLED TO AEDPA DEFERENCE.

The State argues that AEDPA required the District Court to defer to the state court's decision that Mr. Panetti had failed to show by a preponderance of the evidence that he was incompetent to be executed. State's Brief in Opposition at 9. The Fifth Circuit did not address this issue because it upheld the District Court's ultimate conclusion that Ford does not demand a condemned inmate to possess a rational understanding of the reasons for his impending execution. Panetti v. Dretke,

448 F.3d 815, 817 (5th Cir. 2006). However, the District Court correctly decided the issue. Ford's constitutional due process requirements for determining execution competency trump AEDPA. After Mr. Panetti made a substantial showing of incompetency under Article 46.05 of the Texas Code of Criminal Procedure, the state court's refusal to allow him to present psychiatric evidence that differed from the conclusions of the court-appointed experts did not comply with the minimal procedural due process guarantees of Ford.

Seven Justices in Ford expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law required the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. Ford v. Wainwright, 477 U.S. 399, 412 (1986). After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. Id. If the Governor concluded that the inmate was competent, he issued a death warrant. Id. at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. Id.

Although the seven Justices, in three separate opinions, could not agree on the minimum level of process required by the Constitution, all were troubled by the procedural inadequacies of Florida's competency determination. Justice Marshall, joined by three other members of this Court, found the Florida procedure constitutionally inadequate because it precluded the condemned inmate or his counsel from presenting relevant information to the factfinder or participating in the competency determination in any adversarial manner. Id. at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) Recognizing that the probability of making a reliable decision

increases when the factfinder can consider differing psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the factfinder loses the substantial benefit of potentially probative information." Id.

Justice Marshall noted that a related defect in the Florida procedure stemmed from the prisoner's inability to challenge, clarify, or impeach the findings of the state-appointed psychiatrists through cross examination or a less formal method. Id. at 415. He emphasized the important role that questioning the experts serves, because it:

> would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts, concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent.

Id. (citation omitted).

Justice O'Connor also recognized that the Florida procedures for determining competency were constitutionally inadequate. She believed that Florida's failure to permit counsel for the inmate to participate in the competency determination and the Governor's exclusion of all advocacy from the parties involved violated the bedrock due process principle of the opportunity to be heard. Id. at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.).

Like Justice O'Connor, Justice Powell noted that the Florida procedures for determining competency did not comport with the fundamental fairness that is "the hallmark of the procedural protections afforded by the Due Process Clause." Id. at 424 (Powell, J., concurring in part and

concurring in the judgment). Focusing on the fundamental requisite of due process – the opportunity to be heard – Justice Powell concluded that the Florida procedures did not afford the petitioner that opportunity. Id. Because the Florida statute did not require the Governor to review materials that the prisoner submitted, Justice Powell concluded that:

> [T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id.

Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." Id. at 427. Justice Powell refused to apply the presumption of correctness to the state court's findings, because he concluded that the Florida procedures violated both the Due Process Clause and the pre-AEDPA version of 28 U.S.C. § 2254(d)(2) requiring "a full and fair hearing" in state court. Id. at 424. He noted that the statutory hearing prerequisite "is no different from the protection afforded by procedural due process." Id.

In Mr. Panetti's case, the District Court adhered to Justice Powell's reasoning. The District Court explained, "[b]ecause the Court's holding in Ford was grounded in part in the Constitution, subsequent changes to the habeas statute should not alter its determination that no deference may be afforded to state court competency-to-be-executed proceedings resulting in a denial to the petitioner of an effective right to participate." Panetti v. Dretke, 401 F. Supp.2d 702, 706 (W.D. Tex. 2004). Ford's constitutionally-grounded procedural due process holding overrides the Fifth Circuit's

decision in Valdez v. Cockrell, 274 F.3d 941, 946 (5th 2001), which held that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme." See Panetti, 401 F. Supp. 2d at 706 ("[T]here is no reason to believe that the Fifth Circuit intended to hold the AEDPA somehow overruled the Supreme Court's constitutional holding in Ford."). In short, the District Court correctly decided to hold an evidentiary hearing, grant funds so that Mr. Panetti could hire his own experts, and conduct de novo review of the execution competency claim.

II. THE ABSENCE OF AN ASSISTANCE PRONG DOES NOT MEAN THAT THE EXECUTION COMPETENCY STANDARD LACKS THE ELEMENT OF RATIONAL UNDERSTANDING.

The State contends that the lack of an assistance prong for determining execution competency means that Justice Powell rejected the "rational understanding" component found in the trial competency standard of Dusky v. United States, 362 U.S. 402 (1962). State's Brief in Opposition at 12. Contrary to the State's arguments, the ability to assist counsel is not a proxy for rational understanding. If it were, then this Court would not require a petitioner to possess a rational understanding of the consequences of his decision to waive habeas review – a stage of the criminal proceedings past the point of finality and the right to constitutionally-mandated assistance. See Rees v. Peyton, 384 U.S. 312, 314 (1966) (holding that the standard for competency to waive collateral review requires the court to determine whether the petitioner has "the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises"). Justice Powell refused to include an assistance prong in his execution competency standard, not because he did not want the standard to contain a component of rational understanding, but because requiring assistance at that late stage "would give too little weight to the State's interest in finality." Ford v. Wainwright, 477 U.S. 399, 421 n.2 (1986) (Powell, J., concurring in part and concurring in the judgment).

The unitary competency standard discussed in Godinez v. Moran, 509 U.S. 389 (1993), strengthens the proposition that Justice Powell's standard must contain a rational understanding component even in the absence of an assistance prong. Godinez held that the competency standard for pleading guilty or for waiving the right to trial is the same as the Dusky standard for determining competency to stand trial. Id. at 398. This Court noted that "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ***ability*** to understand the proceedings." Id. at 401 n.12 (emphasis in original). In a concurring opinion, Justice Kennedy wrote that "[t]he Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings." Id. at 404 (Kennedy, J., concurring in part and concurring in the judgment). He concluded that "[c]ommentators have agreed that the common-law standard of competency to stand trial, which parallels the Dusky standard, has been applied throughout criminal proceedings, not just to the formal trial." Id. at 407.

This Court originally designed the Dusky standard to protect the constitutional due process rights of a defendant who has not yet been tried, convicted, or sentenced. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996). However, Godinez also equated Rees's "rational choice" language with Dusky's "rational understanding" component, finding that the same level of understanding for competency to stand trial applies to a condemned prisoner who wishes to waive collateral review. 509 U.S. at 398 n.9. Such a prisoner no longer enjoys the protection of the same constitutional rights at issue in the Dusky context, because he has already been validly convicted and sentenced to death. See Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (noting that habeas review is a "secondary and limited"component of the criminal justice process). At this stage, the State acquires a substantial and legitimate interest in finality, in taking the prisoner's life as punishment for the crime. Nevertheless, Godinez recognized that the rational understanding component is the same as Dusky's. The Rees standard differs from Dusky only in that Rees does not require an ability-to-assist-counsel

prong – not because a habeas petitioner need possess only a factual, rather than a rational, understanding of the proceedings, but because a habeas petitioner no longer has a constitutional right to the assistance of counsel. Although the specific factual inquiries for determining competency differ depending on the stage of the criminal proceedings, Godinez emphasizes that courts must assess the answers to those inquiries within the framework of rational understanding. See, e.g., Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000) ("While [the Dusky] standard differs from the Rees competency standard at issue in this case ('capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation'), both standards inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue")

CONCLUSION

The Fifth Circuit's interpretation and application of Ford does not protect the truly insane from being executed. The Court should grant certiorari.

Respectfully submitted,

KEITH S. HAMPTON*
1103 Nueces Street
Austin, Texas 78701
(512) 476-8484

MICHAEL C. GROSS
106 S. St. Mary's Street
San Antonio, Texas 78205
(210) 354-1919

GREGORY W. WIERCIOCH
Texas Defender Service
430 Jersey Street
San Francisco, California 94114
(415) 285-2472

* Counsel of record